

12-1-1990

The Necessity and Effectiveness of Barriers to Foreign Direct Investment

Christopher T. Vrontas

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Law and Economics Commons](#)

Recommended Citation

Christopher T. Vrontas, *The Necessity and Effectiveness of Barriers to Foreign Direct Investment*, 13 B.C. Int'l & Comp. L. Rev. 167 (1990), <http://lawdigitalcommons.bc.edu/iclr/vol13/iss1/7>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.

The Necessity and Effectiveness of Barriers to Foreign Direct Investment

I. INTRODUCTION

There are many people in the United States who fear that their country is at risk of losing its sovereignty.¹ Their fear is born out of an unprecedented increase in large direct and portfolio investments in the country. Foreign investment in the United States has increased 315 percent since 1980.² Investment from Japan, the prime U.S. trade competitor, has skyrocketed 706 percent since that same year.³ Foreigners owned \$1.5 trillion in U.S. assets in 1986.⁴ Economists predict that Japanese investments alone will amount to \$1 trillion in the United States by 1995.⁵ This apparent trend of foreign ownership has instilled fear and resentment in many U.S. citizens.

Foreign direct investment (FDI), in particular, is now a pervasive phenomenon in the U.S. economy and culture. Two hundred and fifty billion dollars of the \$1.5 trillion of foreign owned assets in 1986 were direct investments.⁶ Foreigners own 75 percent of Waikiki Beach,⁷ 10 percent of the U.S. manufacturing sector,⁸ and 12.5 million acres of U.S. farmland.⁹ Much of what most U.S. citizens consider to be "American" is actually foreign owned.

¹ Sontag, *On Japan's Behalf*, Nat'l L.J., Sept. 19, 1988, at 38 [hereinafter Sontag].

² *Id.*

³ *Id.*

⁴ Fierman, *The Selling of America (cont'd)*, FORTUNE, May 23, 1988, at 54 [hereinafter Fierman (cont'd)].

⁵ Lambert & Howard, *U.S. Real Estate: The Japanese Factor*, NOV/DEC, PROB. & PROP. 29, 32 (1987).

⁶ *Id.* Foreign direct investment (FDI) is defined in the Code of Federal Regulations as ownership or control, directly or indirectly, by one foreign person of 10 percent or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch. 15 C.F.R. § 806.7(k) (1981). It also includes ownership interest in immovable assets such as real estate. *Id.* Portfolio investment is simply defined as any investment which is not direct investment. 15 C.F.R. § 806.7(k) (1981).

⁷ Lambert & Howard, *supra* note 5, at 31.

⁸ Fierman (cont'd), *supra* note 4, at 55.

⁹ *Id.* at 56. Twelve and one half million acres is still less than one percent of the total farm acreage in the United States. *Id.*

Two aspects of this phenomenon must be considered before analyzing the law in this area. First, the cause of the increase in foreign investment generally must be understood. Secondly, the cause of the increase of foreign direct investment in particular ought to be determined. Understanding these two developments is necessary to provide a thoughtful analysis on the law regarding foreign investment regulation.

The most significant policy question is whether foreign investment, particularly foreign direct investment, is beneficial or harmful to the United States. Most economists view the infusion of capital as beneficial to the economy, providing jobs, venture capital, new management techniques, and higher productivity.¹⁰ Some politicians fear, however, that foreign control will come with foreign money, and that foreign owners will not consider this country's best cultural and economic interests.¹¹ Many U.S. citizens also fear that foreign speculation will bid real estate prices above the natives' ability to pay.¹² Americans worry of possible U.S. dependency on foreign money, which could hamper domestic policy decisionmaking.¹³ Many U.S. citizens fear colonization or that the United States will suffer exploitation of resources and technology with little received in return.¹⁴ Lastly, some politicians fear that foreign control of industries will affect the national security interests of the United States.¹⁵ Despite the volume of expressed concern and support, the consequences of FDI are still uncertain.

To determine how the United States should regulate FDI, it is instructive to review the approaches other countries have taken. Countries such as Canada and Australia have long grappled with

¹⁰ Koepp, *For Sale America*, TIME, Sept. 14, 1987, at 62.

¹¹ Comment, *A Proposal For Uniform Regulation of Foreign Investment in American Real Estate*, 18 CORNELL INT'L L.J. 147, 151-52 [hereinafter *Proposal for Uniform Regs.*]. See also Katz, *The Legislative Response to Foreign Direct Investment in the United States and Canada*, 2 INT'L PROP. INV. J. 55, 56-62 (1984).

¹² *Id.*

¹³ Katz, *supra* note 11, at 62.

¹⁴ Fierman, *The Selling of America*, FORTUNE, Dec. 22, 1987, at 54-56. See also *Impact of Imports and Foreign Investment on National Security*, Hearings on S. 285, S. 470, S. 694 and § 171 of H.R. 3 Before the Finance Committee of the U.S. Senate, 100th Cong. 1st Sess. 83 (statement by Senator Lloyd Bentsen, Chairman of the Finance Committee) [hereinafter *Finance Committee Hearings*]. Similar fears exist in Canada as well. Katz, *supra* note 11, at 62.

¹⁵ *Finance Committee Hearings*, *supra* note 14, at 21 (statement by Senator Robert Byrd, Senate Majority Leader). "Our national security ultimately depends not only on defense preparedness, but also on our economic strength." *Id.*

the dilemma of the costs and benefits of foreign direct investment.¹⁶ Both countries have perceived FDI as a double-edged sword and have established review systems to screen the pernicious from the beneficial.¹⁷ Some aspects of these review systems can be applied in the United States.

This Comment first discusses the economic developments that have led to increased FDI in the United States.¹⁸ Second, this Comment discusses the costs and benefits of FDI in the United States as well as in Canada and Australia.¹⁹ Third, this Comment discusses the approaches of all three countries to regulating and reviewing FDI.²⁰ This Comment concludes that the Canadian approach best balances the benefits and costs of FDI.²¹ Using the Canadian approach, U.S. policymakers could encourage FDI within the U.S. while preserving national control and identity in certain sectors of the economy.²²

II. BACKGROUND: CAUSES OF FDI AND THE DEVELOPMENT OF INVESTMENT POLICIES

A. *United States*

1. Economic Developments in the United States

a. *Domestic and International Trends Which Have Led to Increased Foreign Investment in the United States*

There are several views that explain the cause of recent foreign investment in the United States. One view maintains that the nation's massive trade deficit has caused the sudden increase in foreign investment.²³ According to this theory the United States is consuming more than it produces, creating a trade imbalance and borrowing money to pay for the difference.²⁴ The country is, therefore, indebting itself so that it may consume more than

¹⁶ See generally Ross & Cranston, *Foreign Investment Restrictions: Defending Economic Sovereignty in Canada and Australia*, 14 HARV. INT'L L.J. 345 (1973).

¹⁷ *Id.* at 356-364.

¹⁸ See *infra* notes 23-47.

¹⁹ See *infra* notes 106-178.

²⁰ See *infra* notes 179-337.

²¹ See *infra* Conclusion.

²² See *infra* Conclusion.

²³ Fierman, *supra* note 14, at 45.

²⁴ DEPARTMENT OF COMMERCE, UNITED STATES TRADE: PERFORMANCE IN 1985 AND OUTLOOK 58-59 (1986) [hereinafter DOC REPORT].

its income (or gross national product) can allow it to buy. The financing must come from abroad. Foreign investors finance this imbalance by making direct or portfolio acquisitions.²⁵ Thus, the trade deficit creates a financial vacuum which has been filled by FDI.

A new view of the causal relationship between the trade deficit and foreign investment differs from the conventional wisdom. The new view maintains that the trade deficit has actually been caused by an increase in capital inflows.²⁶ A nation's imports generally increase when its gross national product (GNP) increases.²⁷ Thus, the new view argues that the current import imbalance is, in large part, a result of the economic growth in the United States throughout the 1980s.²⁸ U.S. policies such as deregulation, tax reductions, and investment tax credits created an optimistic business environment which led to increased investment and thus to GNP growth.²⁹ The GNP growth led to further investment which led in turn to more growth and to an increase in imports. Thus, capital inflows, enticed by the pro-business U.S. economic policies of the 1980s and the resulting economic growth, ultimately caused the trade deficit.

Another view explains that the large government budget deficit has caused the recent influx of FDI. Increased U.S. government demand for financing attracted foreign capital into the United States. While private investors borrowed heavily to finance the economic growth, the U.S. government entered the capital markets as the largest debtor in the world.³⁰ The tax cuts of the 1980s and the resulting deficit spending forced the U.S. government to borrow billions of dollars to pay its bills.³¹ The combined government and private sector demand for loanable funds outstripped domestic supply of loanable funds (i.e., domestic savings).³² Foreign investment made up the difference and the United States became a net debtor nation in 1985.³³ Thus, while the U.S. gov-

²⁵ *Id.* See also Nasar, *To The United States From The IMF: Shape Up!*, *FORTUNE*, Dec. 22, 1986.

²⁶ DOC REPORT, *supra* note 24, at 58-59.

²⁷ *Id.* at 60.

²⁸ *Id.* at 59.

²⁹ *Id.* at 60.

³⁰ *Id.* at 57-58.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 58-59.

ernment's economic policies of the 1980s attracted foreign capital and increased GNP, the government's deficit spending further contributed to foreign capital inflows. Deficit spending and private demand for loanable funds combined to outstrip savings—the domestic supply of loanable funds.

Finally, in addition to domestic economic forces, the international environment encouraged investment in the United States over other nations. The large volume of borrowing during the 1980s in the United States pushed domestic interest rates above rates in other nations, thereby attracting foreign capital.³⁴ During the same decade Europe was suffering from economic stagnation, and the Southern Hemisphere was mired in the Third World debt crises.³⁵ Meanwhile, foreign investors perceived the United States as politically and economically stable.³⁶ The Japanese economy, with its very high savings rate, had huge capital surpluses.³⁷ These factors, combined with the apparent earning potential in the United States, spurred greater foreign investment in the United States than in other countries.³⁸

b. *Investors' Choice in Favor of Direct Investment*

Foreigners have increasingly opted for making direct investments rather than portfolio investments.³⁹ They perceive some direct investments to be simultaneously less risky and higher yielding than portfolio investments in the long run.⁴⁰ The best example of this phenomenon is in real estate. Throughout the 1980s, real property has consistently and prodigiously appreciated in value, in contrast to the gyrations and crashes of the stock market.⁴¹ In addition, U.S. real property is very liquid due to advanced financial services facilitating real estate sales.⁴² Real

³⁴ *Id.* at 58.

³⁵ *Id.* at 58–60.

³⁶ Lambert & Howard, *supra* note 5, at 30. See also Fierman, *supra* note 14, at 49.

³⁷ Fierman, *supra* note 14, at 58.

³⁸ *Id.*

³⁹ Koretz, *The Buying of America: Should We Be Worried?*, Bus. Wk., May 9, 1988. See also Lambert & Howard, *supra* note 5, at 36.

⁴⁰ Koretz, *supra* note 39, at 36.

⁴¹ Lambert & Howard, *supra* note 5, at 30. See also Fierman, *supra* note 14, at 50.

⁴² *Id.*

property is also seen as a safe inflation hedge since its value often appreciates at a rate that exceeds the inflation rate.⁴³

Direct ownership of U.S. companies also creates the opportunity for long term profitability for the foreign investor. The U.S. economy is seen as a generator of new technology, and overseas investors have sought to develop and acquire new innovations for future as well as short term profits.⁴⁴ The United States has abundant resources in human capital.⁴⁵ Its workforce is highly literate and skilled, and its educational institutions are constantly making new discoveries.⁴⁶ In addition to these resources, the United States has a huge consumer base and the lowest corporate tax rate in the world.⁴⁷ Thus, FDI increased as a reflection of foreign investors' optimism for large returns from secure investments.

2. Legal Developments in the United States

a. *Historical and Current State Restrictions*

Restrictions on FDI have existed for centuries. When national economies were largely agrarian, the only direct investment was real estate ownership. The English feudal system disfavored alien land ownership as a method of securing the loyalty of all subjects to the crown.⁴⁸ The restrictions survived through the U.S. colonial period and were adopted in this country's legal system. Thus, aliens were ineligible either to purchase or to inherit land.⁴⁹ During the westward expansion of U.S. settlers, however, many states encouraged expansionism by abolishing some restrictions on alien land ownership.⁵⁰ Although certain states eased restrictions for resident aliens, restrictions for nonresident aliens remained.⁵¹

Some states stopped liberalizing land ownership rights in the late nineteenth century when many wealthy European investors

⁴³ *Id.*

⁴⁴ Fierman, *supra* note 14, at 52.

⁴⁵ THE WORLD ALMANAC AND BOOK OF FACTS 1989 731 (M. Hoffman ed. 1988). The literacy rate in the United States is 99 percent. *Id.*

⁴⁶ *See id.*

⁴⁷ Fierman, *supra* note 14, at 49.

⁴⁸ Comment, *Alien Ownership of Kansas Farmland: Can It Be Prohibited?*, 20 WASHBURN L.J. 514, 516 (1981) [hereinafter *Alien Ownership*].

⁴⁹ *Id.*

⁵⁰ *Id.* at 517.

⁵¹ *Id.*

acquired large stakes of agricultural land.⁵² Land restrictions still exist in all but sixteen states.⁵³ In Minnesota, for example, "no natural person shall acquire directly or indirectly any interest in agricultural land unless he or she is a citizen of the United States or a permanent resident alien."⁵⁴ A similar rule applies against foreign owned corporations.⁵⁵ Missouri restricts nonresident aliens from acquiring agricultural land, broadly defined as a tract of more than five acres capable of supporting agricultural enterprise.⁵⁶ Such land must be divested in two years or be subject to public sale.⁵⁷ Many legal barriers against nonresident foreign ownership persist in the codes of several states as remnants of an economic order that existed centuries ago.

These restrictions are largely ineffective for several reasons.⁵⁸ The states have drafted these laws imprecisely, allowing foreign purchases through local dummy corporations.⁵⁹ State FDI restrictions do not prevent detrimental use of the land because they restrict land ownership rather than land use. Moreover, state laws are not uniform throughout the country. Some states, like Kentucky, have not enforced these statutes for many years.⁶⁰ State land ownership restrictions are, therefore, inherently flawed in their ability to stem foreign ownership.

b. *Recent Federal Legislation*

The federal government has only recently begun regulating FDI. The regulations, however, are very limited and largely center on gathering information. Three main pieces of legislation

⁵² *Id.*

⁵³ POWELL ON PROPERTY, § 102.6-4 (1987). Land restrictions do not exist in Alabama, Colorado, Michigan, West Virginia, Delaware, Florida, Maine, Massachusetts, Missouri, Nevada, North Dakota, Ohio, Rhode Island, Tennessee, Washington, and Vermont. *Id.*

⁵⁴ Forst, *Regulation of Foreign Investment in United States Real Estate: State or Federal Prerogative?*, 21 S. ILL. L.J. 51 (1981).

⁵⁵ *Id.*

⁵⁶ *Id.* at 52.

⁵⁷ *Id.*

⁵⁸ Comment, *Our Land Is Your Land*, 13 J. MARSHALL L. REV. 679, 697 (1980) [hereinafter *Our Land*].

⁵⁹ *Id.* at 682. See also *Proposal for Uniform Regs* *supra* note 11, at 163.

⁶⁰ Fierman, *supra* note 14, at 52. For a thorough analysis of state land ownership restrictions, see Forst, *supra* note 54, at 21; *Proposal for Uniform Regs*, *supra* note 11, at 147; *Alien Ownership*, *supra* note 48, at 514; Comment, *Foreign Investment in United States Real Estate: Federal and State Regulation*, 12 CASE W. RES. INT'L L. REV. 231 (1980); *Our Land*, *supra* note 58, at 679.

have been passed by the U.S. Congress regarding FDI review: the International Investment Survey Act of 1976,⁶¹ the Agricultural Foreign Investment Disclosure Act of 1978,⁶² and the Foreign Investment in Real Property Tax Act of 1980.⁶³ Recently, the U.S. Congress has provided a means for the federal government to regulate FDI under the Omnibus Trade and Competitiveness Act of 1988.⁶⁴

During the 1970s, the U.S. public feared OPEC's monopolistic oil power and its attendant ability to buy large quantities of U.S. assets.⁶⁵ In response, Congress passed the International Investment Survey Act of 1976 (IISA).⁶⁶ Congress' intent was limited, however, to gathering information on the nature and extent of foreign investment.⁶⁷ The IISA presents no barriers to foreign investment except the paperwork requirements of filing informational reports with the Department of Commerce. These reports must detail the companies' ownership, nationality, and amount planned to be invested.⁶⁸ The IISA reporting require-

⁶¹ 22 U.S.C. §§ 3101-3108.

⁶² 7 U.S.C. §§ 3501-3508.

⁶³ 26 U.S.C. §§ 861, 872, 882, 897, 6039C, 6652.

⁶⁴ Pub. L. 100-418, 102 Stat. 1107 (1988) [hereinafter OTCA].

⁶⁵ Langley, *The International Investment Survey Act: The High Cost of Knowledge*, 14 LAW & POL'Y IN INT'L BUS. 481, 481 (1982).

⁶⁶ 22 U.S.C. §§ 3101-08 (1976).

⁶⁷ *Id.* See also Langley, *supra* note 65, at 482.

⁶⁸ 22 U.S.C. § 3103. The Act requires the President to "conduct a regular data collection program to secure current information on international capital flows and other information related to international investment." *Id.* at § 3103(a)(1). The President must ensure that the information collecting system is efficient and adequate. *Id.* at § 3103(a)(3). A periodically published report must be produced containing the results and an analysis of the statistical information collected. *Id.* at § 3103(a)(4). The President is further required to conduct a "comprehensive, benchmark survey at least once every five years" of foreign direct investment and U.S. overseas direct investment after 1987 and 1989 respectively. *Id.* at § 3103(b). That survey will identify the location, nature, magnitude, and changes in total investment. *Id.* at § 3103(b)(1). It shall also obtain certain other business information from individual enterprises such as balance sheets, income statements, and related information regarding trade between a parent and each of its affiliates. *Id.* at § 3103(b)(2)(A)-(C). The survey shall collect employment data from each enterprise and will "determine, by industry and country, the total dollar amount of research and development expenditures by each parent and affiliate, payments or other compensation for the transfer of technology between parents and their affiliates, and payments or other compensation received by parents or affiliates, from the transfer of other persons." *Id.* at § 3103(b)(5). In addition, real estate was given a special level of scrutiny by the statutory requirement for the President to "conduct a study of the feasibility of establishing a system to monitor foreign direct investment in agricultural, rural and urban real property" *Id.* at § 3103(d)(2). This information was to be collected by the Department of Commerce's

ments seem to serve two purposes: 1) to allay public xenophobia, and 2) to gain important economic information regarding foreign investment in the United States.

In 1978, Congress determined that the IISA had inadequate reporting provisions for foreign purchases of U.S. real estate.⁶⁹ In response, Congress passed the Agricultural Foreign Investment Disclosure Act (AFIDA).⁷⁰ AFIDA requires foreign persons to report their holdings of any interest in agricultural properties to the Department of Agriculture (DOA) within ninety days of a transaction.⁷¹

(DOC) Bureau of Economic Analysis. U.S. affiliates of foreign parents were required to make periodic reports to the agency under the IISA. 15 C.F.R. § 806.3 (1977).

The reporting requirements under the IISA were seen by some as an undue burden for U.S. affiliates and as an actual disincentive to foreign investors. Langley, *supra* note 65, at 493. Anonymity is often desired for fear of political reprisals, either from one's own government or from the host population. *Id.* The paper work itself was also considered burdensome. *Id.* Another disincentive allegedly arose from the DOC's efforts to combat a loophole which allowed reporting to stop at the first foreign parent. The DOC amended its reporting regulations to prevent concealment of an actual owner by seeking the disclosure of the "ultimate beneficial owner" (UBO). *Id.* at 495. The UBO is defined as "that person, proceeding up the ownership chain beginning with and including the foreign parent, that is not more than 50 percent owned or controlled by another proxy." 15 C.F.R. § 806.15(a)(6). Requiring the UBO to be revealed to the DOC was also considered overly burdensome because some intermediary owners were often unable to provide such information. Langley, *supra* note 65, at 497. With a \$10,000,000 civil penalty and a criminal penalty of up to one year in jail, this was considered unfair and a serious deterrent to FDI. *Id.* at 502. Furthermore, whenever the secrecy of the UBO is in jeopardy, it was reasoned, many legitimate investors would also be deterred. *Id.* Such concerns have proven false since FDI has quadrupled from the period when those concerns were aired in 1983. See *supra* notes 2-9.

⁶⁹ Note, *Disclosure of Foreign Direct Investment in United States Agricultural Property*, 12 VAND. J. OF TRANSNAT'L L. 665, 672 (1979).

⁷⁰ 7 U.S.C. §§ 3501-3508.

⁷¹ See 7 U.S.C. § 3501(a). AFIDA provides important definitions for its operative terms:

1) Agricultural land is any land located in one or more states and used for agricultural, forestry, or timber production purposes, as determined by the Secretary under regulations to be prescribed by the Secretary. *Id.* at § 3508(1).

2) Foreign person is any individual:

- i) who is not a citizen or national of the United States;
- ii) who is not a citizen of the Northern Mariana Islands or the Trust Territory of the Pacific Islands; or
- iii) who is not lawfully admitted to the United States for permanent residence, or paroled into the United States, under the Immigration and Nationality Act. *Id.* at § 3508(3).

The definition also covers any person, other than an individual or a government, which is created or organized under the laws of a foreign government or which has its principal place of business located outside of all the states. *Id.* It further includes persons organized under the laws of any state in which "significant interest" or "substantial control" is directly

Through the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA),⁷² Congress intended to eliminate the favorable tax treatment previously afforded to foreign investors in real property.⁷³ FIRPTA places all income from the disposition of a U.S. real property interest under the taxing power of the federal government.⁷⁴ Prior to FIRPTA, the United States only taxed foreign real estate owners when their real estate was "effectively connected" to a U.S. trade or business. Now, any income derived from the disposition of U.S. land is a source of income which satisfies the "effectively connected" criterion.⁷⁵ Congress merely

or indirectly held by any aforementioned person or individual. *Id.* Lastly, "foreign person" can also mean a foreign government. *Id.*

The Code of Federal Regulations provides additional definitions:

1) Any interest means all interest acquired, transferred, or held in agricultural lands by a foreign person, except:

- i) security interests;
- ii) leaseholds of less than ten years;
- iii) contingent future interests;
- iv) noncontingent future interests which do not become possessory upon the termination of the present possessory estate;
- v) surface or subsurface easements and rights of way used for a purpose unrelated to agricultural production; and
- vi) an interest solely in mineral rights. 7 C.F.R. § 781.2(C).

2) Significant interest or substantial control implies 10 percent or more of the corporation being held by foreign persons, even when no single individual owns 10 percent. *Id.* at § 781.2(k).

The information gained from the reports filed by foreign persons is collated and analyzed by the DOA and reported yearly to the Congress and the President. *Id.* at § 3504. Reports are also sent to each state's department of agriculture or other appropriate state agency. *Id.* at § 3505.

These reporting requirements seem to address some of the earlier problems inherent in the states' land ownership restriction laws. A foreign person must report his or her name, citizenship, type of interest in the land, and a legal description of the land. *Id.* at § 3501. Still, the UBO need not be disclosed. Though reporting the first parent is not enough to satisfy the statute, a U.S. affiliate need only disclose the second and third tier of ownership. *Id.* at § 3501 and 44 Fed. Reg. 29030 (1979). Thus, foreigners can avoid ultimate disclosure by erecting extensive tiers. Such tactics can be combatted with § 3503 which allows the Secretary to investigate persons reporting for accuracy. *Id.* at § 3503. Although the rule has been used sparingly, a corporate entity may be disregarded where its sole purpose is to avoid the effect of a statute. *See Note, supra* note 69, at 676. With this general rule and the watch dog provision of § 3503, the required extent of the reporting seems unclear. "The regulations suggest that the determination that a foreign person has invested in agricultural property may be sufficient for statistical purposes, without an inquiry into ultimate ownership, and do not address the question of sham corporations." *Id.*

⁷² 26 U.S.C. §§ 861, 872, 882, 897, 6039C, 6652 (1980).

⁷³ *Proposal for Uniform Regs, supra* note 11, at 155.

⁷⁴ *Id.*

⁷⁵ 26 U.S.C. § 897(a)(1). *See also Proposal for Uniform Regs, supra* note 11, at 155. There

intended FIRPTA to balance the previous tax inequity and not to discourage foreign purchases of U.S. real estate.

FDI became a significant phenomenon in the U.S. economy during the 1970s and throughout the 1980s. Yet, the United States failed to establish a uniform policy or a centralized review system for FDI. State regulation proved to be inadequate while federal involvement was limited to information gathering. The historical inadequacy of U.S. policy to FDI led to the recent adoption of the Omnibus Trade and Competitiveness Act of 1988.⁷⁶

B. Canada

In contrast to the United States, Canada has had high levels of FDI in its economy since World War II. In 1945, 43 percent of Canadian industry was foreign owned.⁷⁷ By 1968, 60 percent was foreign owned.⁷⁸ Eighty percent of the foreign controlled enterprises were affiliates of U.S. based corporations.⁷⁹ Thus, since 1945 foreign interests have owned and controlled much of Canada's economy.

Prompted by anti-American sentiment, Canada enacted the Foreign Investment Review Act of 1973 (FIRA).⁸⁰ The animosity resulted from the cumulative effect of foreign investment on the

are significant reporting requirements to enforce the federal tax on land sales. Foreigners who own real property in the United States will likely be required to file information returns to the Department of the Treasury (DOT). Foreign investors must annually file an information return if they are "substantial" investors in a United States real property interest (USRPI). See I.R.C. §§ 6039C(b)(1), (b)(4)(B). A "substantial" investor is defined as an owner of a USRPI with a fair market value exceeding \$50,000. I.R.C. § 6039C(b)(4)(B)(i). The foreign investor is required to report its assets and other business information such as his or her name, address, and legal description of all USRPIs held during the year. I.R.C. § 6039C(c)(1). Like the IISA, such disclosure has created concern amongst those who believe confidentiality is an important inducement to FDI in the United States. Underberg & Teitelbaum, *Foreign Ownership of Real Property in the U.S. in the 1980's*, 1 INT'L PROP. INV. J. 39, 67 (1982). The introduction of a tax burden for foreigners investing in real estate has also created concern regarding its deterrent effect against capital inflows. *Id.* While theoretically justified, such concerns apparently have failed to materialize into reality as the volume and rate of foreign FDI has increased since 1980. See *supra* notes 1-6.

⁷⁶ OTCA, *supra* note 64. See generally *Finance Committee Hearings*, *supra* note 14.

⁷⁷ Katz, *supra* note 11, at 59.

⁷⁸ *Id.*

⁷⁹ Kreiss, *Real Property Investment in Canada: The Foreign Investment Review Act*, 1 INT'L REAL PROP. INV. J. 723, 725 (1983).

⁸⁰ Foreign Investment Review Act, 1973, 21-22 Eliz., ch. 46 [hereinafter FIRA].

Canadian economy, of which a majority originated from the United States.⁸¹ Canadian policymakers feared that economic dependency on U.S. capital would result in political domination by the United States.⁸² The Canadians were particularly suspicious of FDI, which was seen as a tool for exploitation of Canadian natural resources and labor.⁸³ FIRA answered the public's call to stem the tide of perceived U.S. domination.

FIRA's investment regulation terms were stringent and comprehensive. Through FIRA, the Canadian government required any "non-eligible person" to ask for government approval before engaging in a transaction involving a Canadian business or enterprise.⁸⁴ Investors were subject to denial if they did not provide a "significant benefit to Canada."⁸⁵

⁸¹ Kreiss, *supra* note 79, at 726. See also Katz, *supra* note 11, at 59.

⁸² Katz, *supra* note 11, at 60.

⁸³ *Id.*

⁸⁴ *Id.* FIRA defined "non-eligible person" as 1) a person who is neither a Canadian citizen, nor a landed immigrant, 2) any foreign government, 3) a nonresident Canadian citizen, 4) a landed immigrant who has been a resident for more than one year after the date he or she became eligible for Canadian citizenship, 5) corporations controlled by any of the previous people. See FIRA, *supra* note 80, at §§ 3(1)–3(2).

⁸⁵ FIRA, *supra* note 80, at § 9. See also Rose, *The New Investment Canada Act*, 20 INT'L LAW. 19, 21 (1986).

FIRA was mostly concerned about the control of businesses, which was defined as "any undertaking or enterprise carried on in anticipation of profit." FIRA, *supra* note 80, at § 3(1). The mere ownership of real estate was not itself sufficient to be considered a business undertaking. FIRA, *supra* note 80, at § 3(9). There was some uncertainty as to whether land speculation transactions were reviewable. SPENCE & ROSENFELD, *FOREIGN INVESTMENT REVIEW LAW IN CANADA* 140 (1984). Investment in real estate, which contained over 250,000 square feet or which was valued at over \$10,000,000, was generally reviewable as a business enterprise. *Id.* at 150.

To determine if an investment provided a significant benefit to Canada, FIRA gave the following factors for the Foreign Investment Review Agency to use in its review:

(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components, and services produced in Canada, and on exports from Canada;

(b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada;

(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and

(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy

FIRA's stringent terms reflected the government's policy of increasing Canadian ownership and control of the economy. Foreign ownership in the Canadian economy waned subsequent to FIRA's enactment.⁸⁶ Foreign control in manufacturing, petroleum, and natural gas and mining industries fell from 65 percent in 1971 to 53 percent in 1978.⁸⁷ United States control throughout this period fell from 51 percent to 41 percent.⁸⁸ FIRA effectively served to depress the level of FDI in the Canadian economy.

Subsequent economic developments led to FIRA's repeal. In 1982, the Canadian economy lapsed into recession, and the Liberal Party suffered politically.⁸⁹ FIRA was assailed as costly protectionist nationalism which deterred foreign investment.⁹⁰ In 1984, Brian Mulroney and the Progressive Conservative Party won the general election.⁹¹ The new government repealed FIRA through the enactment of the Investment Canada Act (ICA).⁹² The emphasis of the ICA was on expansion of the Canadian economy rather than fear of foreign domination.⁹³ Although Canada did not completely reverse its policy on foreign investment, FIRA became largely discredited.

C. *Australia*

Australia's historical experience with FDI largely reflects that of Canada. Australia's culture, economy, and political system are similar to Canada's. Australia is an English speaking Commonwealth nation with a modern industrial economy. Its population of 16 million is relatively small given the geographical immensity of the country.⁹⁴ Prior to the 1970s, Australia had few legal

objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

FIRA, *supra* note 80, at § 2(2). These comprehensive factors reflected the government's policy to increase Canadian ownership and control of the domestic economy.

⁸⁶ Katz, *supra* note 11, at 77.

⁸⁷ *Id.* at 76.

⁸⁸ *Id.*

⁸⁹ Rose, *supra* note 85, at 21.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Investment Canada Act (1985) 33-34 Eliz., ch. 20 [hereinafter ICA]. See *infra* notes 223-245.

⁹³ *Id.* See also Grover, *The Investment Canada Act*, 10 CANADIAN BUS. L.J. 475 (1985).

⁹⁴ Smiles, *Wizards Needed in Oz*, May EUROMONEY 86 (1987).

barriers to foreign direct investment.⁹⁵ Massive capital inflows in the early 1970s, largely due to the undervalued Australian dollar, led to national concern over the foreign presence.⁹⁶ Like Canada, Australia experienced the disturbing FDI side effects of foreign control and the imposition of foreign values, which often conflicted with the nation's culture and goals.⁹⁷ Finally, public concern over extensive foreign presence led to the adoption of a comprehensive FDI review statute.

In 1972, the Australian parliament introduced certain measures to limit foreign takeovers of local businesses.⁹⁸ Leaders sought to prevent takeovers that conflicted with "national interests."⁹⁹ It was presumed to be in the "national interest" to prevent the foreign takeovers of an industry leading company.¹⁰⁰ For companies that were not industry leaders, a proposed foreign takeover would still need to present foreseeable net benefits to Australia before approval.¹⁰¹ These limited measures were the beginnings of national FDI review in Australia.

By 1975, Australia responded to the increasing foreign presence and passed the Foreign Takeovers Act of 1975 (FTA).¹⁰² The FTA grew out of the measures initially introduced in the early 1970s.¹⁰³ The FTA set up a comprehensive bureaucracy, headed by the Treasurer, which reviews certain foreign acquisitions to ensure that they do not offend the "national interest."¹⁰⁴ As of April 1989, the FTA is still effective in Australia. The

⁹⁵ Ross & Cranston, *supra* note 16, at 361.

⁹⁶ *Id.* at 361.

⁹⁷ *Id.* at 346.

⁹⁸ *Id.*

⁹⁹ *Id.* at 362.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

If this criterion is not satisfied, five other factors are considered: (a) whether, after the takeover, the firm concerned could be expected to follow practices consistent with Australia's interest in matters such as exports, imports, local processing of materials produced, research and development, industrial relations, including employee protection; (b) whether the takeover would have adverse effects on government objectives for defense, environmental protection, on regional development; (c) the extent of Australian participation in ownership and management that would remain after the takeover; (d) the interests of the shareholders of the company subject to the takeover; (e) and the attitude of the board of directors.

Id.

¹⁰² Foreign Takeovers Act, No. 92 (Aug. 1975) [hereinafter FTA].

¹⁰³ Flint, *Legal Regulation of Foreign Investment in Australian Real Estate*, 1 INT'L REAL PROP. INV. J. 615, 620 (1983). See also *supra* notes 98-101 and accompanying text.

¹⁰⁴ FTA, *supra* note 102, at §§ 18-29.

government, however, has supplemented the FTA with regulations which often act to liberalize some aspects of the act.¹⁰⁵

III. THE EFFECTS AND SIDE EFFECTS OF FOREIGN DIRECT INVESTMENT

A. *United States*

While most economists in the United States argue that FDI is an economic boon, some prominent politicians fear possible unwanted foreign influence and control.¹⁰⁶ Some policymakers fear a concerted mercantilist plot to insidiously invade and then destroy U.S. industry.¹⁰⁷ Potentially, foreign owners could monopolize a particular U.S. industry¹⁰⁸ and charge exorbitant prices or otherwise disrupt the economy.¹⁰⁹ Many politicians believe that loss of national control of certain industries could threaten national security.¹¹⁰

U.S. leaders also want to prevent the United States from becoming economically dependent on foreign investors. Overseas investors could trigger a U.S. recession.¹¹¹ An International Monetary Fund (IMF) assessment predicts that when foreigners become troubled by U.S. indebtedness, they will begin to dispose of their dollar denominated assets, causing the dollar's exchange

¹⁰⁵ See *infra* notes 264–76.

¹⁰⁶ Koepp, *supra* note 10, at 62. See also N.Y. Times, Oct. 18, 1988, at 34. In fact, it became a campaign issue during the 1988 presidential election. Democratic presidential nominee Michael Dukakis stumped, "Maybe the Republican ticket wants our children to work for foreign owners and pay rent to foreign owners and owe their future to foreign owners, but that's not the kind of future . . . I . . . want for America." *Id.* Ironically, he made that statement in a factory owned by IFI International S.A. of Luxembourg. *Id.*

¹⁰⁷ *Finance Committee Hearings*, *supra* note 14, at 22 (statement by Senator Robert Byrd, Senate Majority Leader).

¹⁰⁸ Koepp, *supra* note 10, at 60.

¹⁰⁹ *Id.*

¹¹⁰ *Finance Committee Hearings*, *supra* note 14, at 80–81. At the Finance Committee's national security hearing, Secretary of Commerce Malcolm Baldrige stated, "I can only conclude that the common objective of the Japanese government and industry is to dominate the world electronics market. Given the importance of this market to U.S. industry in general and our defense base in particular, we cannot idly stand by." *Id.* at 42 (statement by Secretary of Commerce Malcolm Baldrige). Senate Majority Leader Robert Byrd agreed that, "Our national security ultimately depends not only on defense preparedness, but also on our economic strength." *Id.* at 21 (statement by Senate Majority Leader Robert Byrd). Many policymakers fear that foreign land ownership poses a threat to national security and sovereignty through its effect on agriculture and the food supply. See *Proposal for Uniform Regs*, *supra* note 11, at 151–153. See also *infra* note 220.

¹¹¹ Nasar, *supra* note 25, at 3.

rate to fall.¹¹² Interest rates would then rise dramatically in an effort to maintain foreign investment levels.¹¹³ Such movement would send the economy into recession.¹¹⁴ In this way, foreign investors already indirectly dictate domestic priorities.¹¹⁵ The housing market, for example, is deeply affected by domestic interest rates. Any increase in interest rates to appease foreign capitalists could depress the domestic housing industry.¹¹⁶

National dependence on foreign money can seriously limit U.S. policymakers' range of options. Domestic priorities may lose their importance relative to maintaining FDI levels.¹¹⁷ For example, plans to expand the money supply either to boost aggregate consumer demand or to increase investment may need to be forgone so as to keep interest rates attractive to foreign investors. U.S. leaders already find it difficult to review investments that affect national security.¹¹⁸ National security decisions could even be inhibited by threatened foreign investor disapproval. The Reagan Administration learned this when it blocked Fujitsu from purchasing Fairchild, a microchip company, on national security grounds.¹¹⁹ Foreign investors reacted by cutting their dollar holdings, which caused a brief increase in interest rates.¹²⁰ These are just two examples of how foreign investor reaction can restrict the U.S. government's policy options.

Some skeptics also argue that FDI actually decreases U.S. employment opportunities. The United Auto Workers (UAW) contends that foreign auto assembly plants in the United States eliminate three jobs for every one they create.¹²¹ U.S. citizens thereby lose jobs because foreign owned plants import many of their components from abroad.¹²²

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Koretz, *supra* note 39, at 36. "As long as the U.S. is dependent on foreign capital, trying to control the portfolio decisions of overseas dollar holders is both unreasonable and risky." *Id.*

¹¹⁹ Koepp, *supra* note 10, at 60-62.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* Foreign ownership of U.S. business has sometimes affected job satisfaction. Six top level executives resigned from Lor Geller Federico and Einstein, a New York ad

Foreign investment has resulted in some transfer of U.S. technology overseas.¹²³ Foreign investors can use the new technology they develop in the United States against U.S. firms.¹²⁴ This sets U.S. firms at a deeper competitive disadvantage.¹²⁵ Eventually this technology transfer could displace more U.S. workers.¹²⁶ Furthermore, the technology transfer will likely lead to further research in the foreign nation. This, in theory, results in a transfer of educational and production capabilities to foreign trade competitors.¹²⁷

The farm states are particularly concerned about foreign ownership of agricultural land. Although foreigners own only about 1 percent of the U.S. farm acreage, there are persistent fears that such land could be shut down, sold off, or developed thereby decreasing productive capabilities.¹²⁸ Local leaders also fear that absentee ownership dilutes the sense of local community and decreases civic involvement and responsibility toward the community.¹²⁹ Nonresident aliens bid up the price of land beyond the local residents' ability to buy, causing a malaise in communities where long time residents can no longer afford to live in the land of their ancestors.¹³⁰

While pessimists in the United States insist that the economic glass is half empty, optimists point out that the United States realizes substantial benefits from foreign direct investment. The most obvious benefit is jobs. Foreign companies directly employ about 3,000,000 U.S. citizens or around 3 percent of the work

agency, because they were reportedly tired of working like "indentured servants to British masters." Fierman (cont'd), *supra* note 4, at 56. In addition, foreign management often brings disturbing foreign practices. Japanese multinational corporations regularly favor Japanese over non-Japanese in placement of upper level management. Fallows, *Containing Japan*, ATLANTIC, May, 1989, at 54. Many are known for treating women employees poorly and for consistently not hiring minorities. Powell, et al., *The Asian Challenge*, NEWSWEEK, Oct. 9, 1989, at 72.

¹²³ Fierman (cont'd), *supra* note 4, at 60. See also Powell, et al., *supra* note 122, at 69. Mere dependence on foreign high tech imports tends to atrophy domestic ability to develop the technology required to produce such products domestically. *Id.*

¹²⁴ Fierman (cont'd), *supra* note 4, at 56.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Proposal for Uniform Regs*, *supra* note 11, at 151-153.

¹²⁹ *Id.*

¹³⁰ *Id.* at 152.

force.¹³¹ This injection of income begins an economic multiplier effect which increases the demand for other goods and services, thereby creating further employment.¹³²

Foreign investors are also an important source of funding for research and development.¹³³ Foreign capital financed one quarter of the \$2.3 billion spent on venture capital enterprises.¹³⁴ Thus, many research and development projects would not have continued but for foreign involvement.¹³⁵ Such money effectively helps finance the U.S. leadership role in technology, an area where U.S. investors are reluctant to risk investment.¹³⁶

Foreign direct investment has also introduced new corporate management techniques. These new techniques have increased productivity and have improved the quality of U.S. production.¹³⁷ For example, Japanese owned companies in the United States have a production defect rate six to ten times lower than companies owned by U.S. citizens.¹³⁸

Lastly, optimists believe that the nationality of the owner of an enterprise or piece of real estate is of no import.¹³⁹ Investors seek self-gratification through profits.¹⁴⁰ They are not necessarily agents for a particular nation's strategy to dominate the world.¹⁴¹ Thus, a French investor will act no differently from a Japanese investor or an American investor. Decisions in a capitalist market are simply based on individual profitability.¹⁴²

B. *Canada*

The Canadian experience illustrates the long-term effects of pervasive FDI in a national economy. Canadian leaders have long debated the trade-off between economic growth through foreign

¹³¹ Fierman, *supra* note 14, at 45.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 54.

¹³⁸ *Id.*

¹³⁹ Interview with Carlos De Borbon, Prince of Spain, Economist, in Boston (Sept. 30, 1988). See also Koeppe, *supra* note 10, at 56 (quoting Governor John Waihee of Hawaii, "It's not the origin of an investment dollar that makes it good or bad, but how it is invested.").

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

investment and nationalist gratification through local control.¹⁴³ They have recently reached a compromise under the Investment Canada Act.

Canada has received the same sort of benefits from FDI as has the United States. Such investment brings jobs and a higher standard of living to the local population. But the negative aspect of FDI has been particularly visible in Canada.

In the early 1970s, Canadians began to resent the pervasive presence of U.S. multinational corporations (MNCs) in their economy. They feared that economic dependence on the United States would result in political domination and loss of their national identity.¹⁴⁴ Canadian leaders believed that their ability to formulate economic policy was hampered by the MNCs.¹⁴⁵ Since MNCs' interests are worldwide, their own profitability interests were not necessarily aligned with Canadian interests and were often contrary to those of their Canadian subsidiaries.¹⁴⁶ Thus, Canadian interests were often disregarded by MNCs in search of global profit.¹⁴⁷ For example, foreign MNCs' division of labor often relegated Canadians to low level management by keeping important business decisionmaking power outside of Canada.¹⁴⁸ This phenomenon disadvantaged Canada in its dealings with the rest of the world.¹⁴⁹

Canadians also became concerned about a loss of political autonomy.¹⁵⁰ U.S. policy deeply affected the Canadian economy and belittled the significance of local policymakers.¹⁵¹ U.S. MNCs would obey U.S. law in defiance of Canadian economic or foreign policy. For example, U.S. owned Canadian affiliates would not trade with communist countries.¹⁵² U.S. policies were often advanced at the expense of Canadian industry.¹⁵³

Lastly, Canadians feared U.S. colonization.¹⁵⁴ Specifically, they objected to Canada's symbiotic relationship with the United

¹⁴³ See *supra* notes 80–94.

¹⁴⁴ Kreiss, *supra* note 79, at 726.

¹⁴⁵ Katz, *supra* note 11, at 60.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 61.

¹⁵¹ *Id.*

¹⁵² *Id.* at 62.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

States.¹⁵⁵ Canada's resources were exported to the United States, manufactured, and later returned as finished products.¹⁵⁶ This led to Canadian resentment of the perceived U.S. neo-imperialism. Canadian animosity toward U.S. investment presence led to the passage of the Foreign Investment Review Act.¹⁵⁷

FIRA restricted foreign ownership in the Canadian economy at the expense of economic growth. The recession of 1982 led to a liberalization of the FDI policy established under FIRA.¹⁵⁸ The change created jobs and an economic recovery.¹⁵⁹ As FDI increased through the 1980s, Canada's economy expanded.¹⁶⁰

C. *Australia*

The concerns in Australia regarding foreign investment mirror those in the United States and Canada. Australians have expressed concern over their growing dependency on foreign investment for domestic economic growth.¹⁶¹ Japanese funds underpin the Australian securities market.¹⁶² Japanese money is also needed to develop service properties which are crucial for Australia's vitally important tourist industry.¹⁶³ Approximately 45 percent of Australia's mining industry and 32.9 percent of its manufacturing is foreign owned and controlled.¹⁶⁴ Foreign ownership of important sectors of the economy removes economic power from the local people.¹⁶⁵ The economy begins to produce goods that conform to foreign tastes and values.¹⁶⁶

Like the United States, Australia is concerned with foreign ownership of land. Investors from Japan and Hong Kong have

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Kreiss, *supra* note 79, at 726.

¹⁵⁸ See *supra* notes 92-93.

¹⁵⁹ 2 INVESTING IN CANADA 2 (1988). Canada's economy is the fastest growing of the "big seven" market economies. The "big seven" are commonly thought to consist of the United States, Canada, Japan, Great Britain, West Germany, France, and Italy.

¹⁶⁰ *Id.* Economist Alan Ruyman of the C.D. Howe Institute remarked about the level of FDI in the Canadian economy, "We in Canada have much more foreign ownership than the United States will ever have, and we're one of the wealthiest countries in the world as a result." Koepp, *supra* note 10, at 62.

¹⁶¹ Spur, *Australia Goes Asian*, N.Y. Times, Dec. 4, 1988, (Magazine), at 48.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Foreign Investment Review Board Report 1986-87, Table 3.5 [hereinafter FIRB Report].

¹⁶⁵ Spur, *supra* note 161, at 46.

¹⁶⁶ *Id.*

entered the urban real estate markets with greater buying power than the local population.¹⁶⁷ Prices have sharply risen to meet the new demand.¹⁶⁸ Homeowners who hear about wholesale suburban sell-offs are afraid of becoming tenants in their own country.¹⁶⁹ Australians also feel threatened at the sudden Japanese ownership of 70 percent of the prime resort development in Queensland.¹⁷⁰ Despite the resentment, much of the foreign real estate investment is productive.¹⁷¹ Japanese investment finances the Australian tourist industry and provides an infrastructure "which Australians themselves do not take the risks to provide."¹⁷² Though these investments provide jobs and income for many Australians, many other real estate investments have bid Australians out of their own land.¹⁷³ Australian real estate clearly presents both the advantages and disadvantages of foreign direct investment.

Perhaps the largest cost for a host country receiving foreign investment is simply damage to the public's sense of nationalistic pride. For example, the Japanese have borne the brunt of Australian nationalistic resentment, largely as a result of lingering ill-feeling over World War II.¹⁷⁴ There have been public demonstrations protesting Japanese ownership and the resulting omnipresence of Japanese culture in Australia.¹⁷⁵ The opposition Liberal-National Party is fearful of foreign investment and its counterpart, immigration.¹⁷⁶ It has called upon the Australian government to protect Australia's national identity and its "Judeo-Christian ethic."¹⁷⁷ Thus, a cost of foreign investment is the threat of malaise in the local population or a national feeling of emasculation in the wake of a dominating foreign presence.¹⁷⁸ A compelling problem for policymakers in any country in response to

¹⁶⁷ *Id.* at 46, 48.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 49.

¹⁷³ *Id.* at 46.

¹⁷⁴ *Id.* at 48. Nancy Wake, a popular figure and Australian heroine of the French Resistance, has implored her countrymen not to "accept money from a nasty little enemy." (i.e., the Japanese). *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 52.

¹⁷⁷ *Id.* at 59.

¹⁷⁸ *Id.* at 52.

such public ill-feeling is determining how to calculate the value of national pride.

IV. CURRENT LAW

A. *United States: The Omnibus Trade and Competitiveness Act*

In 1988, Congress passed the Omnibus Trade and Competitiveness Act (OTCA).¹⁷⁹ Unlike the federal statutes previously mentioned, OTCA provides the chief executive with authority to review and, if necessary, deny any applications for foreign investment or ownership in the economy.¹⁸⁰

The threshold for review under OTCA is low. Any foreign investment which amounts to a merger, acquisition, or takeover of a corporate entity is reviewable.¹⁸¹ The corporate entity sought to be acquired must also be engaged in interstate commerce.¹⁸²

The criteria for denying foreign investment applications are limited. The President may deny an application only when there is "credible evidence" that foreign ownership would threaten to impair "national security."¹⁸³ The President's discretion is not subject to review.¹⁸⁴

OTCA provides three factors to help the President determine if an acquisition may threaten national security. The President may consider the domestic production requirements for national defense,¹⁸⁵ the capability and capacity of domestic industries to meet national defense production requirements,¹⁸⁶ and the effect of foreign ownership on the nation's ability to meet its national security needs.¹⁸⁷ These factors are neither mandatory nor exclusive.¹⁸⁸ Rather, they "may" be considered among other factors not mentioned in OTCA.¹⁸⁹

¹⁷⁹ OTCA, *supra* note 64.

¹⁸⁰ *Id.* at § 5021, Amending the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-2170. This provision is commonly referred to as the Exon-Florio Amendment and is codified as 50 U.S.C. App. § 2170.

¹⁸¹ 50 U.S.C. App. § 2170.

¹⁸² *Id.*

¹⁸³ *Id.* at § 2170(d)(1)-(2).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at § 2170(e)(1).

¹⁸⁶ *Id.* at § 2170(e)(2).

¹⁸⁷ *Id.* at § 2170(e)(3).

¹⁸⁸ *Id.* at § 2170.

¹⁸⁹ *Id.*

Although the OTCA provision that grants the review and reject power over FDI is relatively small,¹⁹⁰ the executive branch seems to have received broad new powers. Though the review is limited to the realm of national security, the President's decision cannot be challenged in court.¹⁹¹ Furthermore, the national security criterion is an ambiguous limitation. The term can be broadly interpreted so as to permit review of anything affecting U.S. economic health. Such an interpretation would defy the common usage of the term as applying to areas of national defense. The legislative intent is unclear, however, because the statutory context of the Act seems to conflict with the provision's legislative history.

The three factors provided in the OTCA review and reject provision vaguely define national security.¹⁹² The first two factors specifically refer to private industry's capacity to meet U.S. defense requirements.¹⁹³ But the third factor mentions an apparently separate concern of ensuring private industry's ability to meet this nation's national security needs.¹⁹⁴ If the meaning of national security was limited to that of defense, there would be no need to list the third factor because it would be redundant.

Some insight into the proper scope of national security may be gained by reviewing the Defense Production Act of 1950 (DPA), which was amended by OTCA. Congress passed the DPA during the height of the Cold War as a military readiness, defense mobilization act.¹⁹⁵ Its purpose was to promote national defense by managing the economy in such a way as to meet national security and foreign policy objectives.¹⁹⁶

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at § 2170(e)(1)-(3).

¹⁹⁵ 50 U.S.C. App. §§ 2061, 2062 (1950).

¹⁹⁶ 50 U.S.C. App. § 2062. Congress passed the DPA to oppose "acts of aggression and to promote peace." *Id.* at § 2061. To that end, the DPA sought to "develop and maintain whatever military and economic strength is found to be necessary . . ." *Id.* The more precise objective of the DPA was to provide the President with authority to divert "certain materials and facilities from civilian use to military and related purposes." *Id.* The DPA requires "expansion of productive facilities beyond the levels needed to meet civilian demand." *Id.* The President, pursuant to the DPA, is to use his powers "to promote national defense, by meeting promptly and effectively, the requirements of military programs in support of national security and foreign policy objectives; and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use . . ." *Id.* The statute's declaration of policy was amended in 1953 by stating the congressional intent more precisely. *Id.* (as amended). The amended

Though the effects of the DPA were broad, it closely identified its purpose of national defense with the military. National defense was statutorily defined as follows:

the operations and activities of the armed forces, the Atomic Energy Commission, or any other government department or agency directly or indirectly and substantially concerned with the national defense, or operations or activities in connection with the Mutual Defense Assistance Act of 1949.¹⁹⁷

National defense was later redefined by an amendment to the DPA in 1953.¹⁹⁸ The term was limited to "programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity."¹⁹⁹

The DPA focuses on the capability of the nation to sustain a forceful defense. Since OTCA amends the DPA, OTCA's purposes ought to be read consistently with the purpose of the DPA. Therefore, concerns of national security should not be read to be any broader than the DPA's purposes. The President's national security review for foreign takeovers seems to cover only businesses "directly related" to U.S. military defense.²⁰⁰

provision focuses on the need to bolster "mobilization efforts" so as to prepare the United States for a possible "attack." *Id.* The provision no longer mentions any policy regarding price and wage stabilization. *Id.*

¹⁹⁷ *Id.* at § 2152(d).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ The Joint Conferees stated that the power granted to the president to block mergers, acquisitions, and takeovers of companies "essential to the defense industrial base" under the DPA is unaffected by OTCA. *See* H.R. CONF. REP. NO. 576, 100th Cong., 1st Sess. at 926 [hereinafter CONFERENCE REPORT].

Pursuant to the OTCA amendment to the Defense Production Act (*see supra* notes 180, 181), the Department of the Treasury proposed regulations governing the administration of foreign investment review. 31 C.F.R. 800.101-702 (1989) (Regulations). Though the Regulations define several terms, no definition is given for "national security." *Id.* at 800.201-221.

According to the proposed Regulations, the actual review process begins when the Treasury's Committee on Foreign Investment in the United States (Committee) receives notice of a proposed merger or acquisition. *Id.* at 800.401. Effective notice may either be made by one of the parties in the proposed transaction (voluntary notice) or by one of the members of the Committee (agency notice). No other communication can begin the review process. *Id.*

The Committee must determine whether the proposed investment warrants a "national security" investigation within thirty days of receiving notice. *Id.* at 800.403. The Committee must then complete its investigation within forty-five days. *Id.* at 800.504. Thereafter, the Committee must report its findings and recommendations to the President for final action. *Id.* The President must announce his or her decision within fifteen days of the investi-

Another section of OTCA helps define national security.²⁰¹ Section 1501 requires the Secretary of Commerce to determine when certain imports affect national security.²⁰² Under this provision, the Secretary of Commerce must notify the Department of Defense (DOD) of any import review.²⁰³ The Secretary must consult the DOD as to U.S. defense requirements throughout the course of review.²⁰⁴ The Secretary must also consult other "appropriate officers" of the United States and hold hearings for interested parties to present their information and advice.²⁰⁵ The section does not mention what other information would be relevant to the Secretary's national security review. Although Congress seems to have been primarily concerned with national defense, it did not limit the Secretary's review to only military concerns. Indeed, the door is left open for other concerns to be included within the realm of national security.²⁰⁶ The Secretary must report his or her findings to the President, who makes the final decision as to whether the import affects national security.²⁰⁷

Much of OTCA's legislative history discusses a notion of national security that is broader than the DPA's concept of national defense.²⁰⁸ However, the conference committee report for OTCA cautions against inferring that national security is meant to imply any limitation on the meaning of "national defense."²⁰⁹ This seems odd because OTCA's language implies that national security is a broader concept than national defense. The conferees noted that the term "national defense has been correctly interpreted in the past to include the provision of a broad range of goods and services, as well as technological innovations and economic stabilization efforts."²¹⁰ This definition seems broad enough to include almost any economic interest of the nation.²¹¹

gation's completion. *Id.* at 800.601. Pursuant to section 721, the President may order divestment or other appropriate relief to protect national security. *Id.* Though these Regulations, proposed on July 14, 1989, are not yet law, a foreign investor would be well advised to consider them when planning an investment strategy in the United States.

²⁰¹ OTCA, *supra* note 64, at § 1501.

²⁰² *Id.* at § 1501(b)(1)(A).

²⁰³ *Id.* at § 1501(b)(1)(B).

²⁰⁴ *Id.* at § 1501(b)(2)(A)(i).

²⁰⁵ *Id.* at § 1501(b)(2)(A)(ii)-(iii).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at § 1501(b)(3)(A).

²⁰⁸ CONFERENCE REPORT, *supra* note 200, at 927.

²⁰⁹ *Id.* at 926.

²¹⁰ *Id.* at 927.

²¹¹ *Id.* at 926.

The Senate Finance Committee, chaired by Senator Lloyd Bentsen (D. Tex.), held hearings on national security and its place in OTCA. At the hearing, Secretary of Commerce Malcolm Baldrige testified that the United States' understanding of national security has traditionally centered on the ability of U.S. industries to meet mobilization requirements for global conventional conflict.²¹² He then argued that the traditional view of national security should be broadened.²¹³ He named three areas which he believed are components of economic national security: 1) technologically strategic industries, 2) energy security, and 3) industrial capacity to mobilize.²¹⁴ Though these areas may be broader than the traditional concept of mobilization, they still focus on preserving the self-sufficiency of the U.S. military industrial complex.²¹⁵

The Senate Committee members indicated a broader view of national security than the one proposed by Mr. Baldrige.²¹⁶ Chairman Bentsen linked the national transfer of wealth (i.e., FDI) to national security.²¹⁷ His definition of national security encompassed far more than defense oriented industries. Senate Majority Leader Robert Byrd also had a broader definition of national security than Secretary Baldrige.²¹⁸ Senator Byrd's list of important national security industries, however, may be somewhat biased since his list covers industries located in his constituent state of West Virginia.²¹⁹ Senator Byrd actually implied that the trade deficit itself is a threat to national security.²²⁰ Byrd viewed the trade deficit as the cause of the increased U.S. national debt.

²¹² *Finance Committee Hearings, supra* note 14, at 87 (statement by Secretary Malcolm Baldrige).

²¹³ "National security is comprised of both economic and military security. . . . You can not have one without the other. . . . We must consider impacts on the *defense industrial base*, [as well as] . . . national security implications of foreign investment in the United States, . . . and the importance of a reliable supply of raw materials." *Id.* (emphasis added).

²¹⁴ *Id.* at 92.

²¹⁵ *Id.* "Our nation's defense edge is based on technological strength rather than numerical supremacy." *Id.* at 78.

²¹⁶ *Id.* at 83.

²¹⁷ "I agree that the military defenses of our country are for naught if you don't have a sound economy. And I'm seeing here an incredible transfer of the wealth of our country. And in addition to that, I think an increased vulnerability on national security." *Id.* at 83.

²¹⁸ *Id.* at 35.

²¹⁹ *Id.* (statement by Senator Robert Byrd) "If any industries can be denominated as industries that are very important to national security, certainly the steel industry, the coal industry, the glass, the ferro alloys, the plastics, the chemicals industries—all of these are found in West Virginia, or once did, and they are hurting." *Id.*

²²⁰ *Id.* at 24.

This debt, he argued, will make it more difficult to pay for national defense.²²¹ Thus, any import threatening U.S. business becomes a threat to national security.

Despite the vague statutory language and the ambivalent statements throughout the legislative history, it appears that national security is limited to national defense and its related industries. Even Senator Byrd's industry list has some relationship to the requirements of maintaining a self-sufficient military industrial complex which can ensure a powerful and superior military force throughout the world. OTCA can not fill the role of a protectionist statute.²²²

B. *Canada: The Investment Canada Act*

The ICA repealed FIRA in 1985 and eliminated 90 percent of foreign acquisitions and new businesses in Canada from the review requirement.²²³ Indeed, 75 percent of the new Investment Canada Agency is devoted to the development of investment opportunities and only 25 percent to the review of "significant" non-Canadian investment in Canada.²²⁴

FDI does not trigger review under the ICA unless the investor is a "non-Canadian."²²⁵ A "non-Canadian" is defined as someone who is 1) not a Canadian citizen, 2) not a permanent resident alien, 3) a foreign government, or 4) an entity where one non-Canadian or two or more members of a non-Canadian voting group own a majority of the voting interests of an entity.²²⁶ The ICA removes from review all resident alien purchases.²²⁷

The ICA only reviews "significant" FDI by non-Canadians.²²⁸ This is an element not included in OTCA, but it will soon be

²²¹ *Id.*

²²² *Id.* at 57. National security "has never been intended to be a guise for protectionism." (statement by Senator Charles Grassley).

²²³ Cote, *Canada's New Legislation on Foreign Investment*, INT'L BUS. LAW., June 5, 1985, at 279.

²²⁴ Grover, *The Investment Canada Act*, 10 CANADIAN BUS. L.J. 475 (1985).

²²⁵ ICA, *supra* note 92, at § 14(1). This is different from the old FIRA "non-eligible person" standard. See FIRA, *supra* note 80, at § 3(1)(a)-(c), § 3(2).

²²⁶ ICA, *supra* note 92, at §§ 3, 26(b), 26(d). This standard queried vaguely as to whether a corporation was controlled "in fact" by a "non-Canadian." See FIRA, *supra* note 80, at § 3; ICA, *supra* note 92, at § 3.

²²⁷ FIRA exempted only "landed immigrants" from review. See FIRA, *supra* note 80, at § 3; ICA, *supra* note 92, at § 3.

²²⁸ ICA, *supra* note 92, at § 2. See also Grover, *supra* note 224, at 478.

incorporated into Australia's FTA.²²⁹ An investment is "significant" when a non-Canadian gains control of a Canadian business worth \$5,000,000 or more.²³⁰ An investment to acquire control of a Canadian business through the purchase of its non-Canadian parent company is reviewable if the assets of the parent company are worth \$50,000,000 or more.²³¹ If, however, the Canadian subsidiary's assets comprise more than 50 percent of the parent's assets, the review threshold remains at the lower level of \$5,000,000.²³² Lastly, any new business or acquisition which falls within a specific type of business activity that is "related to Canada's cultural heritage or national identity" is significant and reviewable under the ICA.²³³

The ICA uses a "net benefits" test as a threshold to deny any application for FDI.²³⁴ Canadian law requires that FDI proposals present a "net benefit" to Canada.²³⁵ The factors used to determine such benefits are very similar to those stated in the prior FIRA statute.²³⁶ As in FIRA, the ICA seeks to review FDI's effect on the level and nature of economic activity in Canada.²³⁷ The ICA considers FDI's effect on efficiency, productivity, and degree

²²⁹ See *infra* note 264, at 54.

²³⁰ ICA, *supra* note 92, at § 14(3).

²³¹ ICA, *supra* note 92, at §§ 14(1)(d), 14(4), 28(d)(ii).

²³² ICA, *supra* note 92, at §§ 14, 28. See also Grover, *supra* note 224, at 478.

²³³ ICA, *supra* note 92, at 15(a).

²³⁴ ICA, *supra* note 92, at § 23(3)(a)–(b). See also Grover, *supra* note 224, at 479–480.

²³⁵ ICA, *supra* note 92, at § 20. See also ICA § 23(3)(a)–(b).

²³⁶ ICA, *supra* note 92, at § 20.

The current ICA review factors are as follows:

(a) The effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

(b) the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;

(c) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(d) the effect of the investment on competition within any industry or industries in Canada;

(e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

(f) the contribution of the investment to Canada's ability to compete in world markets.

ICA § 20.

²³⁷ ICA, *supra* note 92, at § 20.

of competition in the Canadian economy.²³⁸ It also reviews the effect of FDI on Canadian participation in management decisions.²³⁹ Most importantly, the ICA, like FIRA, reviews a proposed FDI's compatibility with national economic policies as stated by the Canadian government.²⁴⁰ The ICA factors include consideration of national "cultural goals" as stated by the government.²⁴¹ This is an addition to the FIRA factors and the only material difference between the enunciated factors in the respective statutes.²⁴²

The Investment Canada Act does not seek to regulate foreign purchases of land. Such transactions are reviewable if they involve the acquisition of a Canadian business which satisfies the \$5,000,000 review threshold.²⁴³ Real estate may also be subject to review if it is imbued with some Canadian cultural legacy.²⁴⁴ This policy ensures Canadian control over the symbols of its history and heritage. Section 10(1)(k) of the ICA provides an exemption for foreign real property purchases where there is "an acquisition of control of a Canadian business, the revenue of which is generated from farming carried out on real property acquired in the same transaction."²⁴⁵

C. *Australia: The Foreign Takeovers Act*

In 1975, Australia responded to increasing foreign control by passing the Foreign Takeovers Act (FTA).²⁴⁶ The FTA followed from the measures initially introduced in the early 1970s. The FTA gave the Treasurer, through the new Foreign Investment Review Board (FIRB), the power to review certain foreign acquisitions to determine whether they offend the "national inter-

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Investments are only reviewable if they seek to acquire or establish a Canadian business. ICA, *supra* note 92, at § 14. Under the ICA, an acquisition of all or substantially all the assets of a business, including real property, constitutes an acquisition of such business. ICA § 28(1)(c).

²⁴⁴ ICA, *supra* note 92, at § 15.

²⁴⁵ ICA, *supra* note 92, at § 10(1)(k).

²⁴⁶ See *supra* note 102.

est.”²⁴⁷ The government can prohibit investments that offend the “national interest.”²⁴⁸

The Australian “national interest” approach may technically seem to be less restrictive on foreign investment than the Canadian “net benefits” test. While under the ICA a proposed foreign investment must demonstrate a net positive effect on the local economy, the test under the Australian FTA requires only that proposed investment from abroad must not cause a negative effect on the local economy.²⁴⁹ Thus, the presumption in the respective review schemes seems opposite. However, this legal nuance does not seem to have significantly affected the operation of law.²⁵⁰ Canada’s ICA has actually been more liberal in allowing foreign investment under its stricter presumption than Australia under its looser presumption.²⁵¹

Although not defined by statute, the Treasurer has interpreted “national interest” as requiring a balancing test.²⁵² The FIRB attempts to maximize the benefits of foreign direct investment while minimizing any disadvantages.²⁵³

The FIRB considers two elements in its FDI review.²⁵⁴ These elements are similar to those states in the Canadian ICA.²⁵⁵ First, the FIRB looks to the projected net economic benefits of the FDI.²⁵⁶ The FIRB analyzes whether the proposed investment will increase competition, raise price levels, improve efficiency, introduce new technology and management skills, improve the structure of the economy, or develop new export markets.²⁵⁷ Next, the FIRB seeks to determine whether the business will be in Australia’s best interests.²⁵⁸ Australians want to know whether the FDI will be consistent with their national goals. The FIRB considers how FDI will affect defense policy, national economic pol-

²⁴⁷ FTA, *supra* note 102, at §§ 18–29.

²⁴⁸ *Id.* at § 21(2)(c).

²⁴⁹ *See supra* notes 247–248.

²⁵⁰ *See infra* notes 320, 335.

²⁵¹ *Id.*

²⁵² Flint, *supra* note 103, at 626.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See supra* note 236.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

icy, tax policy, and whether Australians will secure high level decision making positions in the proposed company.²⁵⁹

The threshold for review of existing business begins when a foreign person acquires 15 percent or more of the voting power in a corporation.²⁶⁰ This is defined as holding interests in at least 15 percent of the issued shares of the corporation.²⁶¹ In addition, a proposed takeover is reviewable if two or more persons are in a position to control 40 percent or more of the voting power or 40 percent of the issued shares of the corporation.²⁶² The FIRB may prohibit proposed FDI if it believes that 1) the business's control is at stake, 2) control will fall into the hands of a foreigner, and 3) such control would be against the national interest.²⁶³

The Australian government liberalized some of its foreign investment review policies in the mid 1980s.²⁶⁴ During 1985–86, the government abolished the “opportunities test” in its foreign investment review.²⁶⁵ The test had required a foreign investor to demonstrate that Australians were given an opportunity to purchase any and all assets sought before the investor could purchase such assets.²⁶⁶ In addition, the changes of 1985–86 imposed a requirement for investment applications to show a “net benefit” to Australia rather than the previous “substantial benefits” requirement.²⁶⁷ By 1987, however, even the looser “net benefits” test was abandoned for investment applications in all sectors of the economy except banking, civil aviation, media, uranium, developed real estate, and mining.²⁶⁸ While the excepted industries (or “sensitive industries”) still remain on the “net benefits” test, all other industries are under the even looser “national interest” test.²⁶⁹ Applications for direct investment in the Australian economy will be generally approved unless they are “contrary to the national interest.”²⁷⁰ The abrogation of the “net benefits” test is

²⁵⁹ *Id.*

²⁶⁰ FTA, *supra* note 102, at §§ 21(2), 8, 9(1).

²⁶¹ *Id.* at §§ 8, 9(1)–(3).

²⁶² *Id.* at §§ 8, 9(1)–(3), 21.

²⁶³ FTA § 21(2). *See also* Flint, *supra* note 103, at 622.

²⁶⁴ FIRB Report, *supra* note 164.

²⁶⁵ *Id.* at 2.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 3.

the single most liberalizing change in Australia's review policy since the adoption of the FTA.²⁷¹

In another liberalizing effort, the government is proposing to amend the FTA to limit FIRB reviews of takeovers to Australian companies valued at \$5,000,000 or more.²⁷² Review for new business start-ups in manufacturing currently begins at companies worth \$10,000,000.²⁷³ No equity requirements exist for new companies.²⁷⁴ The increase in the review thresholds makes the Australian FTA review similar to the Canadian "significant investment" review under the ICA.²⁷⁵ This liberalizing trend indicates that the Australian government, like Canada, is gearing its policy towards attracting rather than policing foreign capital.²⁷⁶

Unlike the United States and Canada, Australia has singled out the real estate market as a national interest concern.²⁷⁷ The Australian FDI policy focuses on preventing foreign speculation in domestic real estate investments which seek capital gain or other profit without accompanying benefits to Australia.²⁷⁸ No real estate purchase may be "contrary to the national interest."²⁷⁹ Some carry further requirements such as a 50 percent Australian equity participation or a manifest "net benefit" to Australia.²⁸⁰ The special restrictions governing foreign purchases of Australian real estate reflect the nationalistic attachment Australians have for their land as well as their fear of price increases through over-speculation.

In September 1987, the Australian government moved to severely restrict foreign investment in real estate.²⁸¹ The FIRB focused on developed real estate. Due to upward pressure on capital city housing markets, the new policy forbids all foreign purchases of developed residential real estate. There are three sets of people who are exempt from the ban: Australian citizens

²⁷¹ *Id.*

²⁷² *Id.* (letter of April 30, 1987), at 54.

²⁷³ *Id.* (letter of July 28, 1986), at 52.

²⁷⁴ *Id.*

²⁷⁵ See *supra* notes 228-233.

²⁷⁶ *Id.*

²⁷⁷ Flint, *supra* note 103, at 625.

²⁷⁸ Lieberman & Sternberg, *Some Legal Aspects of Real Estate Investment in Australia*, 2 INT'L REAL PROP. INV. J. 27, 52 (1984).

²⁷⁹ FIRB Report, *supra* note 164, at 2.

²⁸⁰ *Id.* at 26-29.

²⁸¹ Cassie & O'Connor, *Break for Offshore Property Investors*, AUSTRALIAN FIN. REV., NOV. 4, 1987.

residing abroad, foreigners who intend to migrate and reside permanently in Australia, and foreign companies seeking to buy homes for their executives residing in Australia.²⁸²

Additionally, the FIRB abolished the \$600,000 review threshold for foreign purchases of any urban real estate.²⁸³ Prior to September 29, 1987, foreign purchases of urban real estate below the value of \$600,000 were "de minimus" and not subject to review.²⁸⁴ The threshold was cumulative from 1978²⁸⁵ and was an increase from the previous \$350,000 level set in 1980.²⁸⁶ The amendment subjects any and all FDI in urban real estate to the FIRB review.²⁸⁷

The FIRB encourages "productive" investment in real estate. Acquisitions of real estate for development are approved without the need for Australian equity participation provided that they are not "contrary to the national interest."²⁸⁸ Such investment brings the benefits of increased housing stock or business space without any harm to Australia.²⁸⁹ Presumably, these properties are either resold to Australians or used by Australians in a productive capacity. Thus, no restrictions burden foreign investments that lack the evils of speculation and loss of Australian control.

The FIRB currently requires 50 percent Australian equity participation in purchases of developed nonresidential commercial real estate.²⁹⁰ Australian policymakers consider purchases of developed real estate to be unproductive investments that present no benefits to Australia and may possibly bring harm by increasing real estate prices.²⁹¹ Where the 50 percent Australian equity is unavailable, however, 100 percent foreign ownership is permitted provided that foreign ownership is not "contrary to the national interest."²⁹²

²⁸² The Hon. P.J. Keating MP, "Foreign Investment Policy: Developed Residential Real Estate," Press Release by the Treasurer, Sept. 29, 1987 [hereinafter Press Release].

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Lieberman & Sternberg, *supra* note 278, at 52.

²⁸⁷ Press Release, *supra* note 282.

²⁸⁸ FIRB Report, *supra* note 164, at 26. *See also* Press Release, *supra* note 282.

²⁸⁹ Press Release, *supra* note 282.

²⁹⁰ FIRB Report, *supra* note 164, at 26. *See also* Australian Overseas Information Service, *Foreign Investment In Australia*, No. 7 July, FACT SHEET (1988) [hereinafter FACT SHEET].

²⁹¹ Press Release, *supra* note 282.

²⁹² FIRB Report, *supra* note 164, at 26.

In 1986 and 1987, the Australian government liberalized its rules related to rural land.²⁹³ Undeveloped rural land is not subject to review until the cumulative purchases of a particular foreign investor equal \$3,000,000.²⁹⁴ The FIRB requires 50 percent Australian equity participation in any foreign investment scheme in rural property.²⁹⁵ If, however, such equity is unavailable, 100 percent foreign ownership will be allowed if it presents a "net benefit" to Australia.²⁹⁶

Australia has targeted some industries as "restricted policy sectors," which subjects foreign investment in these areas to stricter review.²⁹⁷ These industries include banking, insurance, finance, communications media, mining, civil aviation, and uranium.²⁹⁸ Each area has its own separate equity requirements and review thresholds.²⁹⁹ In aviation and media, however, investments are subject to a vague case-by-case assessment.³⁰⁰ Investments in any of the restricted policy areas must at least present a "net benefit" to Australia.³⁰¹ While the government has begun to liberalize some of the restrictions in these areas, investment barriers remain as a policy tool for the preservation of Australia's culture and retention of local control over its vital industries.

V. COMPARATIVE ANALYSIS OF FOREIGN INVESTMENT REVIEW POLICIES

The U.S. Congress' desire to broaden the definition of national security, manifest throughout the legislative history, reveals some "protectionist" or "economic nationalist" motives. It is an attempt to start government reviews of foreign investment before national security is actually implicated. For example, the House originally sought to require registration of significant FDI and foreign portfolio investments.³⁰² The House also sought additional informa-

²⁹³ *Id.* at 29.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* For a more detailed description of the Treasury's new policy regarding foreign investment in urban real estate pursuant to its announcement on September 29, 1987, see Foreign Investment Review Board Report 1987-1988, Attachment C, 28-30.

²⁹⁷ FIRB Report, *supra* note 164, at 2.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 2-4.

³⁰⁰ FACT SHEET, *supra* note 290.

³⁰¹ FIRB Report, *supra* note 164, at 2-4.

³⁰² CONFERENCE REPORT, *supra* note 200, at 927-928.

tion regarding the identity of foreign investors seeking controlling interests in U.S. corporations as well as the financial and corporate records of those U.S. companies sought to be acquired.³⁰³ Though these initiatives were rejected by the Senate, they clearly display the protectionist sentiment brewing in Congress.

The U.S. national security threshold is confusing and narrow.³⁰⁴ Instead of manipulating the meaning of national security and possibly confusing the law, Congress could have expressly adopted what it evidently desired. The President would then have the authority to review foreign direct investments for their economic, political, and cultural impacts as well as for national security concerns. Instead, the national security criterion limits the President to concerns of military preparedness and arms production.³⁰⁵ Unlike the Investment Canada Agency or the FIRB, the President under OTCA may not review a proposed foreign investment's economic effects such as rent fluctuations, price changes, job dislocations, interest rate patterns, or market concentration.³⁰⁶ The President has no authority under OTCA to review the foreign investment's effect on the decisionmaking role of resident nationals in contrast to the ICA and the FTA.³⁰⁷ OTCA also lacks any provision that authorizes the President to consider any cultural effects of proposed foreign investment,³⁰⁸ whereas both the ICA and the FTA provide protection for "cultural industries"³⁰⁹ or "restricted policy sectors."³¹⁰ Because the national economy affects many important U.S. interests beyond the nation's need to defend itself, the President ought to have the authority to assert those interests when reviewing FDI.

OTCA provides a low threshold for review.³¹¹ It calls for review of all FDI into existing U.S. companies that are engaged in interstate commerce.³¹² Since interstate commerce is a very elastic term, OTCA allows for review of even insignificant purchases.³¹³

³⁰³ *Id.* at 928.

³⁰⁴ *See supra* notes 192–222.

³⁰⁵ *See supra* notes 179–222.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *See infra* note 320.

³¹⁰ *See supra* note 297.

³¹¹ *See supra* notes 179–222.

³¹² *Id.*

³¹³ *Id.*

Thus, the President theoretically must review practically all FDIs to determine if the national security is threatened.

Such an ill-defined and burdensome standard seems unnecessary. Canada's review process begins only when a "significant" investment is proposed.³¹⁴ Australia is currently amending its review scheme to mirror Canada's "significant investment" threshold.³¹⁵ OTCA could similarly be more artfully drafted to provide for a more efficient review system.

Ironically, the review threshold is also somewhat narrow. OTCA does not provide for review of any new business established by foreigners.³¹⁶ Both Canada and Australia consider the significance of such investment in their foreign investment review policies.³¹⁷ OTCA also fails to mention purchases of either urban or rural real estate.³¹⁸ Because there are valid national economic interests that are affected by FDI in these areas, such a review would be beneficial to the United States.

The Canadian approach provides a balanced review of FDI. A nation has an interest in preserving its culture and autonomy while simultaneously enjoying the benefits of outside infusions of capital. The ICA reflects first-hand experience of how excessive review of FDI can hurt a local economy.³¹⁹ Current Canadian investment policy strikes a feasible balance between nationalism and foreign financed growth.

No investment has yet been turned down under the ICA.³²⁰ FDI increased from \$3.8 billion in 1984 to \$6.7 billion in 1986.³²¹ Conservatives in Canada maintain that nationalistic controls devalue Canadian companies and increase corporate concentration by limiting the number of potential buyers.³²² The Mulroney government finds it difficult to see how great concentrations of power in the hands of a small number of large Canadian corporations will benefit the average Canadian.³²³

³¹⁴ See *supra* note 228.

³¹⁵ See *supra* notes 272-274.

³¹⁶ See *supra* notes 179-222.

³¹⁷ See *supra* notes 228 and 273.

³¹⁸ See *supra* notes 179-222.

³¹⁹ *Id.*

³²⁰ *America's Half Open Back Door*, THE ECONOMIST, Jan. 17, 1987, at 66 [hereinafter *Half Open Door*].

³²¹ Jenish, *The New Debate About Takeovers*, MACLEANS, May 4, 1987, at 38.

³²² *Id.*

³²³ *Id.*

Canadians, however, still jealously protect certain "cultural industries."³²⁴ One difference between ICA's "net benefit" factors and FIRA's "significant benefit" factors is the ICA's addition of cultural policy concerns.³²⁵ These protected industries include film production, book publishing, and newspapers.³²⁶ The Canadian government also wants to achieve 50 percent Canadian ownership of the energy industry.³²⁷ The ICA displays a lingering distrust of foreign money despite the liberalizing trend.

Canada's current FDI review policy is a better balanced approach than the policies stated in FIRA and OTCA. The ICA encourages FDI in those sectors of the Canadian economy where the legislature has deemed such investment to be appropriate.³²⁸ The ICA also clearly states governmental policy on certain industries and thereby notifies foreign investors of any possible problems.³²⁹ Lastly, the ICA satisfies the public's desire for domestic control over those industries which serve to represent, depict, preserve, and develop Canadian culture.³³⁰ In contrast, while OTCA's national security criterion is difficult to define and focuses too narrowly on only one important national interest, FIRA proved to be overly burdensome.

Australia is following Canada's liberal trend in its foreign investment review policy largely in an attempt to pull itself out of economic stagnation.³³¹ Throughout the 1980s, Australia was in recession with high interest rates and a huge international debt burden.³³² The debt and the erratic currency were major factors discouraging foreign investors. In addition, the Australian population of 16 million is not a large enough customer base to attract firms when severe legal hurdles exist. Infusions of foreign capital and foreign management have been regarded as a means for economic recovery.

In response, Australia has begun to lower its barriers on FDI.³³³ Foreign investment doubled in 1987 from the previous year as a

³²⁴ *Half Open Door*, *supra* note 320, at 66.

³²⁵ Compare FIRA, *supra* note 80, at § 2(2) with ICA, *supra* note 92, at § 20.

³²⁶ *Half Open Door*, *supra* note 320, at 66.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ See *supra* notes 246-301.

³³² *Id.*

³³³ *Id.*

result of the liberalization policy.³³⁴ Only one FDI proposal was rejected because it was "contrary to the national interest."³³⁵ Though the rules have been loosened, they are well tailored to address the specific evils Australians want eradicated.³³⁶ Specific industries are protected, and only certain deleterious real estate investments are barred.³³⁷ Australia has encouraged FDI where there are no perceived side effects that could weaken its small struggling economy.

VI. CONCLUSION

Barriers to foreign direct investment are as old as the legal system. Originally, feudal kings required oaths of fealty before a person could own or manage land. Nations still view land as a special asset affecting the food supply and touching nationalistic emotions.

As the global economy became more complex, nations began to identify with their manufacturing capacity and research ability. Some distrust of foreign money is well founded as countries have become subjugated to the will of another through the power of investment. Yet, there are undeniable benefits to foreign capital inflows. Foreign investment, if monitored and used properly by the host country, can provide economic growth, new technology, and prosperity.

The United States currently reviews FDI only for national security concerns. The FDI review provision in OTCA does not protect the United States from the risk of dependency, resentment, and malaise that foreign money may bring.³³⁸

Canadian leaders have learned through experience that foreign values and control are attached to foreign direct investment.³³⁹ With this understanding they review the economic and cultural effects of significant FDI before permitting its entry.³⁴⁰ Moreover, the Canadian review system has spurred economic growth. Their system has allowed a 100 percent increase in FDI over the last five years.

³³⁴ FIRB Report, *supra* note 164, at 4.

³³⁵ *Id.* at 6.

³³⁶ See *supra* notes 246-301.

³³⁷ *Id.*

³³⁸ See *supra* notes 179-222.

³³⁹ See *supra* notes 143-160.

³⁴⁰ See *supra* notes 223-245.

Australia's FDI controls have also been liberalized in an effort to stimulate economic growth.³⁴¹ Its government has begun loosening regulations in banking, real estate, and manufacturing sectors, and has generally relaxed the benefit requirements for investment applications.³⁴² Still, Australia has preserved strict controls where foreign money is thought to be "contrary to the national interest."³⁴³ Though many controls are gone, distrust of outsiders remains.

U.S. leaders must take a broad, pragmatic view of FDI and understand its far reaching effects, both positive and negative. Although U.S. policy should protect national heritage as well as national security, the United States must be careful not to fall into economic isolationism. Overrestriction will yield few benefits. The United States should use the Canadian example of using FDI for its own interests. Foreign investment need not lead to foreign domination.

Christopher T. Vrontas

³⁴¹ See *supra* notes 264–301.

³⁴² *Id.*

³⁴³ *Id.*